Supreme Court, U. S.
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IN THE

Supreme Court of the United States

JUNE TERM, 1980

No. 79-1347

STANLEY H. SPENCER,

Petitioner,

v.

GREYHOUND LINES, INC., and
AMALGAMATED TRANSIT UNION, LOCAL #1516,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT GREYHOUND LINES, INC.'S BRIEF IN OPPOSITION

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INTRODUCTION

Respondent Greyhound Lines, Inc., respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Fourth Circuit in this case. This brief is being filed pursuant to Rule 24.1 of the Rules of this Court within thirty days of March 1, 1980, the date on which the petition was received.

QUESTIONS PRESENTED

1. Whether dismissal of the Title VII count of a civil rights action on the ground that the suit was not timely filed should be reviewed, when, after all evidence was in, the trial court made a specific finding that petitioner had not made out a case under the standard of proof required in Title VII cases.

2. Whether the trial court's sustaining a motion to quash petitioner's subpoena *duces tecum,* after first having inspected the subpoenaed documents *in camera,* should be reviewed where there is no evidence in the record of the content of the documents, where petitioner failed to object to the trial court's action, and where the trial court was the finder of fact.

STATEMENT OF THE CASE

Petitioner, Stanley H. Spencer, filed a charge with the Equal Employment Opportunity Commission (the "EEOC") alleging that Greyhound Lines, Inc., ("Greyhound") had discriminatorily discharged him because of his race. He received two right-to-sue letters from the EEOC, one dated December 27, 1976, and the other dated January 10, 1977.

Within ninety days of receipt of these letters, petitioner filed suit against Greyhound and Amalgamated Transit Union, Local #1516 alleging, *inter alia,* that Greyhound had unlawfully terminated him because of his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, and in violation of 42 U.S.C. § 1981. The case was set for trial on October 31, 1977.

On October 7, 1977, petitioner personally moved the Court for leave to remove and dismiss his attorneys of record. The motion was granted, and confirmed by order entered October 17, 1977. The order stated that granting the

motion would not be grounds for continuance of the October 31, 1977, trial date. Respondent's App. A.

Petitioner then retained new counsel. On October 25, 1977, petitioner, by counsel, moved for a continuance of the trial, which motion was denied, and unsuccessfully renewed the motion on October 29, 1977. Respondent's App. B. At the commencement of the trial on October 31, 1977, petitioner moved for a voluntary dismissal of the case under Rule 41(a)(2) of the Federal Rules of Civil Procedure, which motion was granted. Respondent's App. C.

On November 14, 1977, petitioner instituted a new suit against the same defendants, setting forth the same causes of action. On motion of the defendants, petitioner's Title VII claim was dismissed on a finding that his second suit was not filed within ninety days of receipt by him of the EEOC's notices of right-to-sue as required by 42 U.S.C. § 2000e-5(f)(1).

Prior to trial of the second suit on the remaining claims, petitioner moved for issuance of a subpoena *duces tecum* for certain files compiled by Greyhound. Greyhound filed a motion to quash. There is no record of the District Court's action on the motion to quash, although in argument before the Fourth Circuit it was disclosed that Judge Merhige, the District Judge who tried the case, had reviewed the documents *in camera* and had ruled that they need not be furnished to petitioner. No objection was made to the District Court's action, and there is no record of the content of the documents.

At the conclusion of a two-day trial without a jury, the District Court held that there had been no showing of racial discrimination against petitioner, and that his discharge "was on legitimate grounds without regard to race." Petitioner's App. at 16.

Petitioner appealed to the United States Court of Appeals

for the Fourth Circuit. Immediately before argument on October 3rd, petitioner personally dismissed the attorney who had tried the District Court case and had briefed his appeal, and the appeal was argued by his present counsel, and by petitioner *pro se*.

The panel, Judge Butzner presiding, issued a *per curiam* opinion on November 1, 1979, affirming the District Court. Petitioner's App. at 2-3.

REASONS FOR DENYING THE WRIT

I.

Petitioner's Attempt To Seek Review Of The Trial Court's Dismissal Of His Title VII Claim Is Inappropriate In View Of The Trial Court's Specific Finding That Petitioner Was Discharged For A Legitimate, Nondiscriminatory Reason.

Dismissal of petitioner's Title VII claim was premised on the proposition that where an action is voluntarily dismissed without prejudice, the parties are left as if the action had never been brought, *see Hall* v. *Kroger Baking Co.*, 520 F.2d 1204 (6th Cir. 1975), with the result that the pendency of a case thus dismissed will not serve to toll the ninety-day time period for filing Title VII actions.[1]

Petitioner seeks to avoid this result by attempting to create an equitable ground for relief such as existed in *Braxton* v. *Virginia Folding Box Co.*, 72 F.R.D. 124 (E.D. Va. 1976),

[1] The fact that petitioner sought dismissal of his first action rather than resisting dismissal distinguishes the Fifth Circuit cases cited by petitioner from the Fourth Circuit's decision in this case. In *Brown* v. *O'Leary*, 512 F.2d 485 (5th Cir. 1975), *Mann* v. *Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 488 F.2d 75 (5th Cir. 1973), and *Pond* v. *Braniff Airways, Inc.*, 453 F.2d 347 (5th Cir. 1972), the dismissals of the cases by the trial courts were opposed by the plaintiffs through motions to reinstate the cases or to vacate the dismissal order. It was held to be an abuse of discretion by the trial courts on the facts of those cases to fail to reinstate the actions, as the plaintiffs urged.

written by Judge Merhige, the District Judge who tried petitioner's case. In *Braxton*, a timely-filed petition to intervene in a Title VII action was withdrawn after the ninety-day period for filing suit had elapsed, with the understanding on the part of the Court and all counsel that the claim could proceed as a separate suit. In those circumstances the ninety-day limitation for filing Title VII actions was not permitted to defeat the separate suit which was thereafter filed. By contrast, in granting petitioner's motion in this case to dismiss his first suit, Judge Merhige specifically reserved the question of whether the pendency of that suit would toll the time limitation. See Petition at 10.

Petitioner's proffered equitable grounds for relief bear little similarity to the grounds which existed in *Braxton*. Petitioner suggests that he is not a sophisticated litigant, yet the motion to dismiss was not made by petitioner *pro se*, but by an attorney whom he had employed after discharging his first set of attorneys more than three weeks prior to trial, after first having been advised that the trial date would not be continued because of the discharge. See Respondent's App. A. Among those discharged attorneys were Henry L. Marsh, III, and Randall G. Johnson, of the firm of Hill, Tucker, and Marsh, all experienced counsel in Title VII litigation. *See, e.g., Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 261 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976). Nothing supports petitioner's assertion that these attorneys were not prepared for trial, or that this was the reason he discharged them.

In any event, the question of whether or not the pendency of petitioner's first suit should have tolled the ninety-day limitation for filing his Title VII claim was rendered moot as to his case by the District Court's action at the conclusion of the trial in measuring the evidence as though the Title VII

claim had not been dismissed "because [Judge Merhige] want[ed] to satisfy [his] own mind as to whether [he] would end up with a different result if this were Title VII as distinguished from 1981." Petitioner's App. at 14. The Court determined "that race did not play any part in Mr. Spencer's discharge," that he was discharged for admitted violation of company policies, and found

> not only that the evidence fails to disclose any discrimination against Mr. Spencer on account of his race, but that Greyhound has satisfied the Court that his discharge was on legitimate grounds without regard to race. While the Douglas [*McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973)] test of the burden is of doubtful application, it is of no consequence in light of the Court's satisfaction that Mr. Spencer's discharge was for legitimate nondiscriminatory reason.

Petitioner's App. at 16.

II.

The Trial Court's Action In Quashing Petitioner's Subpoena Duces Tecum After First Conducting An In Camera Inspection Of The Subpoenaed Documents Does Not Raise An Issue Deserving Review.

Petitioner's argument that this Court should review an action which was an incidental part of the trial of his case is premised on the assumption, unsupported in the record, that certain documents which he sought by subpoena *duces tecum* contained information of dishonest conduct on the part of certain of Greyhound's witnesses.

Proceeding on this assumption, petitioner argues that he should have had access to these documents for the purposes of impeaching the witnesses. Apart from ignoring the procedural defects that no objection was made to the trial

court's action in quashing the subpoena *duces tecum*, and that no effort was made to have the documents sealed and made a part of the record, petitioner's argument fails to recognize that the trial court, which heard the case without a jury and which was the judge of the credibility of the witnesses, reviewed the documents *in camera* and knew their content when evaluating the testimony of the witnesses.

Even were there merit to petitioner's argument, it obviously pertains to a singularly unique aspect of the trial of his case, and hardly presents an issue deserving review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Greyhound Lines, Inc.

March 26, 1980

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 77-0121-R

STANLEY H. SPENCER,
Plaintiff,

v.

GREYHOUND LINES, INC.,
and
AMALGAMATED TRANSIT UNION
LOCAL UNION DIVISION NO. 1516,
Defendants

ORDER

This matter comes before the Court on oral motion made by Plaintiff on October 7, 1977 to remove and dismiss his attorneys of record from this action and from further obligations with respect to this action. These attorneys are as follows:

C. Allen Riggins
310 South Boulevard
Richmond, Virginia 23220

Susan G. Moenssens
Moenssens & Moenssens
3810 Seminary Avenue
Richmond, Virginia 23227

Henry L. Marsh, III
Randall G. Johnson
Hill, Tucker, & Marsh
214 East Clay Street
Richmond, Virginia 23219

Accordingly, this Court hereby orders that the above stated attorneys are removed and dismissed from this action and any further obligations with respect to this action. This order will not be grounds for continuance of the October

31, 1977 trial date. Unless notified to the contrary, Counsel for Defendants Greyhound Lines, Inc. and Amalgamated Transit Union Local Division No. 1516 will treat this action as being pursued *pro se* by Plaintiff and will make all necessary communications directly to Plaintiff at the following address:

Route 2, Box 360
Gloucester, Virginia 23061
(804) 693-4369

Entered this 17 day of October, 1977.

ROBERT R. MERHIGE
U. S. District Court Judge

Seen and Consented to:

STANLEY H. SPENCER
C. ALLEN RIGGINS
RANDALL G. JOHNSON
ANDREW W. WOOD
ALEXANDER WELLFORD

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 77-0121-R

STANLEY H. SPENCER,
Plaintiff

v.

GREYHOUND LINES, INC.,
and
AMALGAMATED TRANSIT UNION
LOCAL UNION DIVISION
No. 1516,
Defendants

NOTICE

Please Take Notice that on the 28th day of October, 1977, at 6:00 p.m., or as soon thereafter as Judge Robert R. Merhige, Jr., returns from his trip to Greece, the undersigned will make an application for a continuance of the trial of the above-styled case which is scheduled on the 31st day of October, 1977 for the grounds and reasons previously set forth in prior motions hand delivered to you on the 25th day of October, 1977 and to which Judge Warriner has denied the said motions.

STANLEY H. SPENCER

By: SA'AD EL-AMIN
Of Counsel

Sa'ad El-Amin
Sa'ad El-Amin & Associates
7th & Franklin Building
Suite 1515
Richmond, Virginia 23219

(Certificate of Service omitted in printing.)

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 77-0121-R

STANLEY H. SPENCER,

Plaintiff

v.

GREYHOUND LINES, INC.,
and
AMALGAMATED TRANSIT UNION
LOCAL UNION DIVISION

Defendants.

ORDER

For the reasons stated from the bench and deeming it proper so to do, upon motion of the plaintiff it is ADJUDGED and ORDERED pursuant to Rule 41(a)(2) of Federal Rules of Civil Procedure that this action stands dismissed without prejudice upon the following terms:

1. If any suit against these defendants for a similar cause of action as contained herein be instituted it be done so within a period of fifteen (15) days from this date.

2. That within fifteen (15) days of this date plaintiff deliver to the Clerk of Court a bond, with surety to be approved by the Court, in the amount of $7,500.00 to cover costs expended by the defendants in preparation for trial this day, as well as any reasonable duplicative attorneys' fees that may be required as a result of the reinstitution of this action.

Let the Clerk send a copy of this order to all counsel of record.

ROBERT R. MERHIGE, JR.
United States District Judge

Date: October 31, 1977